

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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SANDRA SWISTAK,  
Plaintiff,

v.

MICROSOFT CORPORATION,  
Defendant,

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**COMPLAINT**

Civ. Cas. No.:

**JURY TRIAL DEMAND**

**NATURE OF THE CASE**

1. This is an action brought by the Plaintiff, SANDRA SWISTAK, ("Plaintiff"), the member of a protected class, for age discrimination pursuant to 29 U.S.C. §621 *et seq.*, the Age Discrimination in Employment Act, ("ADEA"), as amended (covers ages 40 years of age or older in employment); retaliation pursuant to 42 U.S.C. §§ 2000e *et seq.*, the Civil Rights Act of 1964 ("Title VII"); and claims under the New York State Human Rights Law, Executive Law Section 290, *et seq.* ("NYSHRL") for age discrimination and retaliation.

**JURISDICTION AND VENUE**

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1343.
3. The Court also has supplemental jurisdiction pursuant to 28 U.S.C. §1367 to adjudicate Plaintiff's claims under state law.

4. Venue is proper pursuant to 28 U.S.C. § 1391.

**ADMINISTRATIVE EXHAUSTION**

5. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission New York District Office on or about November 17, 2011, alleging age discrimination in violation of the ADEA, and discrimination and retaliation under Title VII.
6. A Right to Sue Notice was issued by the Equal Employment Office on December 11, 2012.
7. Less than ninety (90) days have elapsed since the Plaintiff's receipt of that Notice, and her subsequent filing of the instant complaint in this matter.
8. Accordingly, Plaintiff has administratively exhausted her claims.

**PARTIES**

9. Plaintiff is an individual female over the age of 40, born on July 11, 1958, who, at all times relevant herein, is a 53 year old former employee of the Defendant, and a resident of the County of Monroe, State of New York.

10. Upon information and belief, the Defendant is a business corporation organized and existing under the laws of the State of New York.

**FACTS**

11. Plaintiff, a female over the age of 40, was born on July 11, 1958.
12. For all relevant times set forth in this Complaint, the Plaintiff 53 years old.
13. Plaintiff was formerly employed by the Defendant since on or about February 2008 as a "Commercial Account Manager."
14. Plaintiff was originally hired by Supervisor Anne Curran; under Ms. Curran's reign, Plaintiff had zero performance issues, and even received the Defendant's "100% Sales Achievement Award" that year.
15. Ms. Curran left Microsoft in 2009, and was replaced by Supervisor Karl Shultz, who would become Plaintiff's primary tormentor.

16. At the time Ms. Curran departed, Plaintiff was 87% of quota, and a top performer in the district.
17. As further proof of that fact, in 2009 Microsoft announced a layoff which effected 5% of the workforce: although multiple account mangers were unfortunately let go, *Plaintiff was not*.
18. Plaintiff maintained an "above average" work performance record during her employment with the Defendant prior to her retaliatory termination on September 13, 2011.
19. In fact, in 2011, Plaintiff achieved 105% of quota, again, with no performance issues, and was yet again the recipient of Microsoft's "*100% Sales Achievement Award*" in 2011.
20. During this period of Plaintiff's employment, however, she developed a good faith basis to believe she had been subject to both sex and age discrimination.
21. First, Plaintiff was the oldest female in her department.

22. Second, Plaintiff was the top performer in her district, having exceeded her quota in the several years that she was employed by Defendant.
23. Notwithstanding, on August 2, 2010, Plaintiff's male Supervisor Karl Schultz sent her a confidential email stating, *for the first time*, that her job performance was "*unacceptable*," and that her continued employment with the Defendant was "*at risk*."
24. On August 2, 2010, Plaintiff replied to this email, and copied several top managers within Microsoft.
25. Plaintiff explained to these high-ranking managers that she believed Supervisor Schultz's comments were unfounded, that she was being unfairly judged, and that she was being intimidated with threats of termination.
26. On April 8, 2011, Supervisor Shultz sent Plaintiff a note asking her, *for the first time*, to create a "Development Plan."
27. Plaintiff created this "Development Plan" in accordance with Defendant's standards.

28. However, despite crafting the Development Plan in accord with Defendant's standards, Supervisor Shultz sent her various ambiguous emails throughout the day, scrutinizing and criticizing her plan.
29. For example, Supervisor Schultz kept changing the requirements for the "development plan," making it difficult to understand at best, and impossible to comply with, at worst.
30. Plaintiff made several earnest attempts to accomplish the purported goals of the "Development Plan," no matter how confusing the guidelines had become under Supervisor Shultz's directives.
31. However, Plaintiff had a good faith basis to believe that Supervisor Schultz was purposefully setting Plaintiff to fail, as a way and means to terminated her because of her age and sex, for the reasons explained below.
32. On April 15, 2011, Supervisor Schultz called Plaintiff for a "one-on-one meeting" where he completely degraded Plaintiff personally, and degraded her work.

33. During the course of that meeting, Supervisor Shultz stated:

*"you are like a chef that got hired by mistake. The restaurant needed a chef to cook chicken, steak, seafood and other foods, and all you can do is cook fish. We don't have time to wait and learn for you to cook chicken, steak, seafood and you need to learn to cook all the items on the menu immediately."*

34. Supervisor Schultz's highly subjective, non-objective comment shocked the Plaintiff since her February, 2011 mid-year review was "above average;" all of a sudden, Plaintiff was suddenly incompetent.

35. Later that day, Supervisor Schultz sent Plaintiff another email wherein he stated that her "development plan" was *"not up to [his] standards."*

36. Moreover, he degraded Plaintiff's work and experiences once again in a very gratuitous and condescending tone.

37. No other co-worker was subject to Supervisor Schultz's berating behavior.

38. On April 16, 2011, Plaintiff emailed both Supervisor Schultz and Human Resources to complain of Supervisor Schultz's conduct.
39. In that April 16, 2011 email, Plaintiff addressed the fact that Supervisor Schultz was setting her up for failure, and that his continued harassment had to stop; Plaintiff further pleaded that Supervisor Schultz stop treating her differently from other co-workers, and from creating a hostile work environment.
40. Neither Supervisor Schultz nor Human Resources took any remedial action on Plaintiff's behalf, and Plaintiff's complaints were largely ignored.
41. On May 10, 2011, in apparent retaliation to Plaintiff's email, Supervisor Schultz, for the first time ever, unilaterally changed the title of the "Development Plan," to "**Performance Plan.**"
42. Supervisor Schultz began nit-picking, scrutinizing, and criticizing every move Plaintiff made, and constantly gave Plaintiff negative comments and feedback regarding her work in an effort to "file build" a justification



for her termination.

43. Supervisor Schultz continued to threaten Plaintiff's job.

44. Neither Supervisor Shultz nor Human Resources ever responded to Plaintiff's serious and legitimate complaints about differential treatment and abuse by Supervisor Shultz.

45. On May 13, 2011, Plaintiff again complained to Supervisor Schultz about his constant harassment, and the toll it was taking on her.

46. Plaintiff pleaded with Supervisor Schultz to give Plaintiff *some* clarification on her work, but nothing changed, and no remedial action was ever taken on Plaintiff's behalf.

47. On May 15, 2011, Supervisor Schultz sent Plaintiff a letter erroneously accusing her of derogatory and inflammatory comments.

48. On May 18, 2011, Plaintiff submitted the work she had done with regard to the "Performance Plan."

49. Once again, Supervisor Shultz degraded her work and Plaintiff personally.

50. On May 30, 2011, Plaintiff filed a formal complaint with the Microsoft Diversity Department regarding her Supervisor Schultz's relentless, retaliatory, disparate, and harassing behavior against her on the basis of sex and age.

51. Additionally, Plaintiff requested a new supervisor or another position within Respondent as a way to remedy the harassment.

52. Plaintiff was informed that Microsoft would "conduct a formal investigation," commencing on or about June 2011.

53. Three months later, in or about the first week of September 2011, Diversity informed Plaintiff that her investigation found no discrimination or hostility, and Plaintiff's request for a new manager was denied.

54. Plaintiff asked her for a detailed report from the investigation, however Plaintiff was denied all access to the investigation.
55. Shortly thereafter, ***i.e within days***, on September 13, 2011, Plaintiff was terminated in retaliation for her good faith complaints of discrimination in the workplace.
56. The Plaintiff, the eldest female in her department was terminated on the basis of her age, and age was the "but for" reason for her termination.
57. Plaintiff was fired in close temporal proximity with her good faith complaints of discrimination in the workplace, made directly to Microsoft's Diversity Department as per Microsoft's clearly delineated human resource policies.
58. Defendant had no legitimate business reason for the actions it took against the Plaintiff, a long term, high performing employee of Microsoft.

59. Any reason proffered by the Defendant is merely a pretext for unlawful discrimination.

**FIRST CAUSE OF ACTION**  
**Violation of the Age Discrimination in Employment Act**

60. Plaintiff repeats and incorporates by reference the allegations stated above as if they were set forth in full herein.
61. The employment practices of the Defendant described above harm older employees of the defendant and favor younger employees. The practices so described are not based upon a reasonable factor other than age, and age is in fact the "*but for*" reason for the actions taken herein, particularly in light of the fact that Plaintiff was the eldest female in her department.
62. Defendant purposefully engaged in age discriminatory practices with the full knowledge that in so doing, it was discriminating against its older employees, without regard for the rights of those employees under the ADEA.

63. Defendant, through its high ranking supervisory employees, unduly scrutinized, engaged in file building, and terminated Plaintiff on account of her age, and thereby violated her right to equal employment opportunity as protected by the ADEA.
64. As such, Plaintiff is entitled to liquidated damages and attorney fees under the ADEA.

**SECOND CAUSE OF ACTION**  
**Violation of the NYSHRL**

65. Plaintiff repeats and re-alleges by reference each and every allegation contained in the above stated paragraphs, and incorporates the same herein as though fully set forth.
66. Defendant, through its agents, engaged in a pattern of unlawful age discrimination based on age in that Plaintiff was subject to repeated and undue performance scrutiny, file building, and then terminated, while other substantially younger employees were maintained, and promoted regularly, in violation of the NYSHRL. This claim does not raise a novel or complex issue of law.

67. Defendant at all times relevant herein had actual and constructive knowledge of the conduct described above.

68. As a result of the discrimination perpetrated and maintained by defendant and to Plaintiff, and their failure to protect the Plaintiff from discrimination, Plaintiff suffers emotional distress.

69. Defendant violated the NYSHRL by failing to adequately supervise, control, discipline, and/or otherwise penalize the conduct, acts, and failures to act of the defendant as described above.

70. Defendant failed to comply with their duty to take all reasonable and necessary steps to eliminate age discrimination from the workplace and to prevent it from occurring in the future.

71. As a direct and proximate result of defendant's willful, knowing and intentional discrimination against her, Plaintiff has suffered mental anguish and emotional anguish and emotional anguish and emotional distress, and she has suffered and will continue to suffer a loss earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

**THIRD CAUSE OF ACTION**

**Retaliation Under TITLE VII**

72. Plaintiff repeats and re-alleges by reference each and every allegations contained in the above stated paragraphs and incorporates the same as though fully set forth herein.
73. During the year of 2011, Plaintiff engaged in a *myriad of forms of protected activity* when she in good faith informed both Supervisor Shultz directly and her employer that she was subject to discrimination based on sex, the last complaint of which occurred May 30, 2011 to the Defendant's Diversity Department.
74. That by formally protesting the conditions of her work place with management and supervisory personnel directly on the basis of sex, Plaintiff engaged in protected activity under 42 U.S.C. § 2000 (e).
75. Thereafter, Plaintiff was subject to adverse actions as stated above, culminating in the Plaintiff's termination, that were materially adverse and that would dissuade a reasonable employee such as the Plaintiff from making further complaints of discrimination both in the workplace and to the EEOC.

76. As a direct and proximate result of defendant's willful, knowing and intentional discrimination against her, Plaintiff has suffered and will continue to suffer emotional distress, and a loss of earnings, and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at the time of trial.
77. As a further and proximate result of the defendant's violations of Title VII, Plaintiff has been compelled to retain the services of counsel in an effort to enforce the terms and conditions of the employment relationship with defendants and each of them, and has thereby incurred and will continue to incur, legal fees and costs, the full nature and extent of which are presently unknown to the Plaintiff. Accordingly, Plaintiff requests that attorney fees be awarded.
78. Defendants conduct as described herein was malicious and oppressive, and done with a conscious disregard of Plaintiff's rights. The acts were performed with the knowledge of an employers' economic power over its employees. Consequently, Plaintiff is entitled to exemplary damages.



**FOURTH CAUSE OF ACTION**

**Retaliation under the NYSHRL, EXECUTIVE LAW, §290, et seq.,**

79. Plaintiff repeats and re-alleges by reference each and every allegations contained in the above captioned paragraphs and incorporates the same as though fully set forth herein.
80. During the year of 2011, Plaintiff engaged in a *myriad of forms of protected activity* when she in good faith informed both Supervisor Shultz directly and her employer that she was subject to discrimination based on sex, the last complaint of which occurred May 30, 2011 to the Defendant's Diversity Department.
81. That by formally protesting the conditions of her work place with management and supervisory personnel directly, Plaintiff engaged in protected activity under the New York State Human Rights Law, § 290 et seq.
82. Thereafter, Plaintiff was subject to adverse actions as stated above, including termination, that were materially adverse and that would dissuade a reasonable employee such as the Plaintiff from making further complaints of discrimination in the workplace.

83. As a direct and proximate result of Defendant's willful, knowing and intentional discrimination against her, Plaintiff has suffered and will continue to suffer severe mental and emotional anguish, and she has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at the time of trial.

**WHEREFORE,** Plaintiff respectfully request the Court to enter judgment in her favor, consistent with the above referenced causes of action.

DATED: February 22, 2013  
Rochester, New York

By: *CHRISTINA A. AGOLA, PLLC*  
*/s/Christina A. Agola , Esq.*

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